

Estoppel and the Importance of Straight Talking

Thorner v Curtis
[2008] EWCA Civ 732

Introduction

The doctrine of proprietary estoppel is living in interesting times, having recently had only its second substantive consideration by the House of Lords. In *Cobbe v Yeoman's Row Management Ltd.*, their Lordships held that an oral commercial arrangement that is binding in honour only cannot usually generate a proprietary estoppel claim.¹ Another context in which the doctrine has increasingly been applied is the domestic sphere, particularly in cases of testamentary promises made orally to unpaid workers. Writing extra-judicially, Lord Walker has recognised the importance of estoppel in providing a remedy in these 'assistance' cases.² Nevertheless, in spite of the commercial nature of the facts in *Cobbe*, the wide-ranging remarks of their Lordships (particularly Lord Scott) could have serious implications for such domestic cases. Indeed, Ben McFarlane and Andrew Robertson have (perhaps prematurely) contemplated the demise of proprietary estoppel as a doctrine in its own right.³ *Thorner v Curtis* was the last domestic case to be decided by the Court of Appeal before *Cobbe*.⁴ *Thorner* itself has recently been the subject of an appeal to the House of Lords, and their Lordships' judgments will be eagerly awaited.

This note will evaluate the Court of Appeal's decision on its own terms. The case centred on the nature of a relevant representation. This essential requirement for an estoppel claim is inevitably problematic in the domestic context, and the matter has some parallels with the infamous notion of 'common intention' in relation to constructive trusts of the family home.⁵ The difficulty is particularly acute when the representor is an elderly and potentially vulnerable individual. Judges are charged with the unenviable task of balancing issues including testamentary freedom, capacity, the potential for undue influence and certainty on the one hand, with the arguable desirability of enforcing promises made to a long-suffering unpaid worker on the other. In *Thorner*, the Court of Appeal tightened the requirements for a relevant representation, thereby shifting that balance in favour of the alleged representor and his or her estate.

The facts

The late Peter Thorner was a Somerset farmer with a 'strong and proud personality'.⁶ He was a 'man of few words', a private individual who tended to speak in indirect terms.⁷ He also disliked paperwork and had literacy problems. In 1976, Peter's first wife died. Partly out of a sense of

¹ [2008] UKHL 55, [2008] 1 W.L.R. 1752.

² R. Walker, "Which side 'ought to win'? Discretion and certainty in property law" (2008) 6(3) *Trust Quarterly Review* 5.

³ B. McFarlane and A. Robertson, 'The Death of Proprietary Estoppel' [2008] *Lloyd's Maritime & Commercial Law Quarterly* 449.

⁴ [2008] EWCA Civ 732, [2008] 2 F.C.R. 435.

⁵ See, e.g., M. Dixon, [2007] *Conv.* 352.

⁶ [2008] EWCA Civ 732 at [5].

⁷ [2007] EWHC 2422 (Ch) at [31].

familial obligation, David Thorner, the son of Peter's cousin Jimmy, stepped in to help at Peter's farm at that time. As well as helping with the animals, David built fences, worked on farm buildings and undertook 'a great deal' of the administration and paperwork associated with the farm, which was known as Steart Farm.⁸ At one time, he was working 18-hour days, splitting his time between Peter and Jimmy's farms, and unsurprisingly had little in the way of a social life. Health problems eventually prevented Peter from carrying out physical work, and his need for assistance therefore increased. Peter also suffered psychiatric problems during ancillary relief proceedings arising from the breakdown of his second marriage, and David cooked meals for him several times a week during this period.

David was not the only person who helped out at Steart Farm, and Peter employed workers at various stages. Nevertheless, Peter expected more from David than he did from any of his employees, and there was evidence that the farm would have ceased to trade profitably if it had not been for David. He was never paid for almost 30 years of being 'at Peter's beck and call', and he turned down other career opportunities in order to remain in Somerset with Peter and his own parents.⁹

Peter had made a will in 1997, under which David would have inherited the farm, but that will had been revoked a year later. Whatever the reason for the revocation, and despite warnings from his solicitor about the consequences of intestacy, Peter never replaced the 1997 will and he died intestate, divorced and childless in 2005.

David brought a proprietary estoppel claim against Peter's estate. He had been hoping to inherit the farm since the 1980s and claimed that Peter had made 'various noises' causing him to believe that he would inherit it, but admitted that 'nothing very definite' was said.¹⁰ The main event on which David based his claim occurred in 1990, and consisted of Peter handing David a Bonus Notice relating to two life insurance policies on the former's life, with the remark: 'that's for my death duties'.¹¹ David also sought to rely on other indirect remarks, made to him by Peter concerning the running of the farm, which he claimed reinforced his expectation that he would inherit it. Finally, he cited things that Peter said to others, which gave the impression that David would succeed him.

The first instance decision

At first instance, Deputy Judge John Randall QC allowed the proprietary estoppel claim to succeed.¹² He was satisfied that, given Peter's characteristics, his actions in 1990 could amount to an assurance that David would inherit the farm, and that his later actions reinforced a mutual understanding between them. Reliance was established by David's passing up the other employment opportunities, and substantial detriment was incurred by David's unpaid work after 1990. Taking a holistic view, the judge found that Peter's conscience was sufficiently affected to justify the intervention of equity. The judge decided that the appropriate remedy would be to transfer to David the farm land and all the agricultural assets in the estate. This effectively satisfied his expectation.

⁸ [2007] EWHC 2422 (Ch) at [62].

⁹ [2007] EWHC 2422 (Ch) at [82].

¹⁰ [2007] EWHC 2422 (Ch) at [86].

¹¹ [2007] EWHC 2422 (Ch) at [94].

¹² [2007] EWHC 2422 (Ch); [2008] Conv. 65.

The Court of Appeal's approach

Writing in an earlier issue, Martin Dixon considered Deputy Judge Randall's decision to be 'neither unexpected nor likely to be overturned on appeal'.¹³ Nevertheless, Peter's personal representatives, comprising two of his sisters and his niece, successfully challenged the decision in the Court of Appeal. Lloyd LJ, giving the only substantive judgment, recognised that the matter 'turned on whether Peter's act in handing over the Bonus Notice [was] sufficient to amount to a promise, representation or assurance which can be the basis of a proprietary estoppel claim.'¹⁴ He concluded that it was not.

Representations in the Testamentary Context

Lloyd LJ began by analysing the history of using estoppel to enforce testamentary promises, something that had occurred 'only in the last 20 years or so'.¹⁵ He noted that the realm of testamentary dispositions presents particular problems as compared to the classic estoppel scenario involving a property owner standing by while the claimant incurs expenditure on the land in the belief that he has an interest in it.¹⁶ He was especially concerned by the popular misconceptions surrounding succession law. In a testamentary case, according to Lloyd LJ, it is necessary to distinguish a statement of current testamentary intention, which could be a mere statement of fact and should not be relied upon, from a promise or representation as to what the property owner is going to do by will, which could found an estoppel claim.

While Deputy Judge Randall had emphasised that an expectation could be created in a wide range of circumstances, and focused on the requirement of a broad enquiry into the factual matrix, Lloyd LJ was conscious of the need for caution in the testamentary sphere. Of course, he was correct to say that a greater range of possible meanings could be attached to statements regarding testamentary dispositions. Nevertheless, he may have been too quick to treat testamentary cases differently, and this will be a key issue for the House of Lords to resolve.

Lloyd LJ went on to express the view that a representation in the testamentary context must be 'clear and unequivocal', while refusing to rule out that a representation could be made through conduct alone.¹⁷ He also said that the representation must in general be intended to be relied upon before it can generate an estoppel, or at least be 'reasonably taken' as so intended.¹⁸ Perhaps unfortunately, the 'reasonableness' qualification is less obvious from some of Lloyd LJ's later formulations of the rule, probably for the sake of conciseness.

Lloyd LJ admitted that intention for a representation to be relied upon was not often expressed as a requirement, but explained this on the basis that in most cases it was either taken for granted or obvious on the facts. He showed that the representations in all but two of the previous testamentary authorities were in fact intended to be relied upon, in the sense of being aimed at influencing the specific behaviour of the claimant or addressing his or her 'question,

¹³ M. Dixon, "Estoppel and testamentary freedom" [2008] Conv. 65, 69.

¹⁴ [2008] EWCA Civ 732 at [17].

¹⁵ [2008] EWCA Civ 732 at [31]. Significantly, he mentioned *Taylor v Dickens* [1998] 1 F.L.R. 806 only to note its disapproval (at [34]).

¹⁶ On appeal, David's counsel tried the alternate submission that David had improved the value of the land, but this was not entertained ([2008] EWCA Civ 732 at [57]).

¹⁷ [2008] EWCA Civ 732 at [54].

¹⁸ [2008] EWCA Civ 732 at [54].

request or complaint'.¹⁹ In the exceptional cases, *Ottey v Grundy*²⁰ and *Campbell v Griffin*,²¹ the assurances were 'express, clear and sincere'.²² This, on Lloyd LJ's analysis, was sufficient to commit the representor to his representations even if they were unprompted.

Lloyd LJ hoped that this would address some of the criticisms of *Gillett v Holt*, which led Gray and Gray to write of a 'deep ambivalence' towards the revocability of a testamentary promise.²³ He emphasised that the Court of Appeal could not say in general how formal a promise had to be before it was considered irrevocable. Nevertheless, if it a statement was found to be intended to be relied upon, or could reasonably be taken as so intended, it should be considered irrevocable (provided the other requirements for proprietary estoppel are satisfied). If it was not, it should be considered a mere statement of fact and therefore revocable. This was an admirable attempt to clarify the law, but the precise meaning of intent for a statement to be relied upon is not easy to extract from the judgment.

The Application of the Principles to the Facts

At first instance the judge described the handing over of the policy documents as 'something of a watershed', transforming David's hope of inheriting into an expectation.²⁴ Given Peter's characteristics as a private individual, Deputy Judge Randall was willing to accept that he was signalling his intention that David should succeed him at the farm. The judge also held that the indirect remarks made to David encouraged this expectation, since Peter had discussed matters that 'it was only necessary to communicate to someone who would be there after Peter had gone'.²⁵

Lloyd LJ was unconvinced. On his more objective and arguably harsher analysis, 'Peter never said anything to David which...amounted to a statement, still less a promise, that David would inherit the farm'.²⁶ In his view, the 'unspoken mutual understanding' recognised by the judge was not enough,²⁷ and even the 1990 event gave rise 'at most to implication and inference'.²⁸ In spite of the judge's finding that Peter had intended to indicate that David would inherit the farm, it was decisive that there was no 'express statement whose meaning and effect can be examined', as there had been in the previous authorities.²⁹ While Lloyd LJ thought it unsurprising that Peter should regard David as the 'most suitable inheritor' of the farm, he was equally unsurprised that 'he should say or do things consistent with his holding that opinion'.³⁰ Allowing for Peter's characteristics and holding that those words and actions could constitute a

¹⁹ *Re Basham (dec'd)* [1986] 1 W.L.R. 1504; *Wayling v Jones* [1995] 2 F.L.R. 1029; *Gillett v Holt* [2001] Ch. 210; *Jennings v Rice* [2002] EWCA Civ 159.

²⁰ [2003] EWCA Civ 1176.

²¹ [2001] EWCA Civ 990.

²² [2008] EWCA Civ 732 at [52].

²³ K. Gray and S.F. Gray, *Elements of Land Law* 5th ed (Oxford: OUP, 2008), para. [9.2.46].

²⁴ [2007] EWHC 2422 (Ch) at [94].

²⁵ [2007] EWHC 2422 (Ch) at [98].

²⁶ [2008] EWCA Civ 732 at [55].

²⁷ [2007] EWHC 2422 (Ch) at [94].

²⁸ [2008] EWCA Civ 732 at [61].

²⁹ [2008] EWCA Civ 732 at [66]. Lloyd LJ considered that the remarks other than the 1990 incident added little to David's case. Moreover, he effectively discounted the remarks made to others: while they may corroborate the findings about the remarks to David, they were irrelevant in themselves since there was no suggestion that they were to be passed on to him.

³⁰ [2008] EWCA Civ 732 at [55].

representation, it seems, would have diluted the requirement that a representation is clear and unequivocal and introduced an unacceptable degree of subjectivity to the analysis.

Even if there had been a sufficiently clear representation, it may have been a challenge to prove that it was intended to be relied upon. Nevertheless, given the circumstances, it is arguable that it would have been reasonable for David to take it as so intended. For his part, Lloyd LJ noted that the judge had not directly addressed this question. In considering what Deputy Judge Randall's conclusion might have been if he had done so, Lloyd LJ placed a high degree of weight on the fact that Peter knew nothing of the opportunities that David had passed up. Lloyd LJ decided that the 1990 statement was, 'at most, a statement of present intention' to which Peter was not committed, even if he maintained that intention in fact.³² It was therefore unreasonable, in the view of the Court of Appeal, for David to rely upon it without further enquiry.

In justifying his conclusion on the representation, Lloyd LJ emphasised that because of the 'potential and inevitable fluidity and flexibility of proprietary estoppel, as a doctrine of equity based on conscience', the requirements of proprietary estoppel had to be 'applied with a certain degree of rigour of analysis'.³³ He was particularly concerned that a proprietary estoppel claimant could be in a stronger position than a beneficiary under a will given the revocability of the will. Dixon opines that the requirement of an express representation is simply 'to substitute one kind of formality for another'.³⁴ There is certainly force in this argument, and Lloyd LJ's judgment is unduly objective in its focus. Nevertheless, one can sympathise with his anxiousness that there be at least one clear criterion for the operation of estoppel, rather than setting too much store by the more nebulous concept of unconscionability, even if it is 'key that unlocks the door' to a remedy.³⁵

The Irrelevance of Mere Intention

Lloyd LJ admitted that Peter probably intended to leave the farm to David until the time of his death, particularly given the likelihood that he destroyed his will only in order to prevent one of the other beneficiaries, with whom he had fallen out, from sharing in his estate. Mere intention, however, was not enough to generate an estoppel, and could not compensate for the lack of a clear representation. Consistently with *Gillett v Holt*, the claim had to be 'made out sufficiently clearly and reliably to prevail even if the landowner has changed his mind, for good or bad reason',³⁶ and was therefore 'independent of Peter's ultimate intentions'.³⁷

Given the importance attached to a clear representation by Lloyd LJ, this conclusion stands to reason. The unconscionability that justifies the equitable intervention must stem from the conduct of the property owner in making a representation and failing to honour it, by accident or design, rather than from the operation of the formality requirements themselves. While the fact that Peter intended David to inherit the farm increases the likelihood that he made a relevant representation and adds to the perceived unfairness of the result, it does not justify the operation of estoppel if no such representation can be found.

³² [2008] EWCA Civ 732 at [72].

³³ [2008] EWCA Civ 732 at [69].

³⁴ Dixon [2008] Conv. 65, 68.

³⁵ *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17 at [24].

³⁶ [2008] EWCA Civ 732 at [59].

³⁷ [2008] EWCA Civ 732 at [3].

Detrimental Reliance

Deputy Judge Randall had been prepared to accept that the handing over of the documents ‘strongly encouraged’ or ‘was a powerful factor in causing’ David to stay at the farm.³⁸ The judge rejected the suggestion that David was motivated solely by the need to look after his own parents, since one of his brothers would have been able to do so. Lloyd LJ found it difficult to decide whether the reliance requirement had been satisfied, for understandable reasons. Given that the test for reliance is to ask what the claimant would have done had the representation been withdrawn, it is not easy to perform the test if one does not think that a representation was made in the first place.

There was no doubt in the minds of either Deputy Judge Randall or Lloyd LJ that David had incurred detriment through the unpaid work that he performed for so many years. Lloyd LJ, for example, recognised that David ‘devoted long hours altogether selflessly to Peter’.³⁹ Inevitably, however, the sheer extent of the sacrifice made does not of itself justify the success of a proprietary claim, and David’s claim had failed long before the full extent of his detriment came to be assessed by the Court of Appeal.

The Remedy

Deputy Judge Randall had held that, as a result of the ‘remarkable’ level of commitment he demonstrated, David had a ‘compelling case’ for the fulfilment of his expectation.⁴⁰ He decided that it would be neither disproportionate nor unjust for that expectation to be satisfied, even given the ‘minimum equity’ approach necessitated by *Jennings v Rice*.⁴¹ The judge had imposed some limits, however. There was a suggestion that David’s expectation at times extended to the entire estate, but Deputy Judge Randall held that to award the whole estate to David would have been disproportionate even if his expectation had so extended.

Since David’s claim had failed, the Court of Appeal considered it unnecessary to address the remedy. Extra-judicially, Lord Walker has expressed doubts about the propriety of the dichotomy he introduced in *Jennings v Rice*, comprising ‘bargain’ and ‘non-bargain’ cases, suggesting that the principles governing the exercise of the remedial discretion are ripe for re-examination.⁴² Given that no estoppel was found, *Thorner v Curtis* was hardly the place for this re-examination to be undertaken.

Conclusion

Thorner v Curtis is a hard case, and the Court of Appeal’s judgment is a complex one. Few will fail to be sympathetic towards David Thorner, and Lloyd LJ himself admitted that he had a ‘strong moral claim’ to inherit Steart Farm.⁴³ Lloyd LJ could be criticised for over-concentrating on the representation requirement at the expense of his duty to consider the matter in the round.

³⁸ [2007] EWHC 2422 (Ch) at [94].

³⁹ [2008] EWCA Civ 732 at [64].

⁴⁰ [2007] EWHC 2422 (Ch) at [140].

⁴¹ [2002] EWCA Civ 159.

⁴² R. Walker, (2008) 6(3) *Trust Quarterly Review* 5.

⁴³ [2008] EWCA Civ 732 at [75].

At the very least, it is notable that he gave little weight to the judge's findings on the subjective intentions and characteristics of the parties when searching for a representation. That said, even if it survives *Cobbe* largely intact, proprietary estoppel is unlikely to be an appropriate mechanism by which to provide a general *quantum meruit*-based remedy for unpaid work. Moreover, as confirmed by *Thorne*, the doctrine is not always able to give effect to the intentions of a property owner when he has failed to comply with formality requirements, even in the face of considerable detriment on the part of the claimant, since otherwise those requirements would be undermined. Of course, we have not heard the end of the matter, and it is hoped that proprietary estoppel's most recent visit to the House of Lords. (this time in 'testamentary' guise) will be of assistance. A claim under the doctrine may require a clear representation, but the basis of proprietary estoppel itself is equally in need of clarification.

Brian Sloan*

PhD Candidate, Gonville & Caius College, Cambridge

* I am grateful to Professor Kevin Gray for his comments on an earlier draft of this note. All errors are my own.